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SECTION 603 OF S. 1324, AS AMENDED

SEC. 603. Subject to the authority of the Attorney General, [t]he FBI shall supervise [be responsible for] the conduct of all investigations of violations of the espionage laws of the United States by persons employed by or assigned to United States diplomatic missions abroad. All departments and agencies shall report immediately to the FBI any information concerning [indicating] such a violation. Other departments and agencies shall provide appropriate assistance to the FBI in the conduct of such investigations. Nothing in this provision shall be construed as establishing a defense to any criminal, civil, or administrative action.

PROPOSED LANGUAGE FOR CONFERENCE REPORT

Background

Section 603 was adopted by the Senate for the purpose of assigning to the FBI overall responsibility for the conduct of espionage investigations at U.S. embassies and other diplomatic establishments outside the United States. Recent espionage cases at such locations have highlighted the lack of overall, uniform direction governing such investigations.

Various departments and agencies of the U.S. Government assign personnel to U.S. diplomatic establishments. These include both civilian and military personnel as well as contractor employees. When particular employees who are subject to U.S. laws are suspected of espionage, the agency with responsibility for any ensuing investigation has depended upon the particular office within an embassy employing the individual concerned. For example, if military personnel were involved, the investigating agency would depend upon the branch of service of the serviceman concerned. If the employee were a civilian, the investigation might be carried out by the FBI alone or acting in concert with other appropriate investigative elements. By making the FBI responsible for the conduct of all such investigations, the Senate sought to ensure that the U.S. agency with predominance in the counterintelligence field would, indeed, direct all such investigations, regardless of the employing department or agency, and would thereby develop expertise in dealing with such cases at diplomatic establishments that would, in time, improve the efficiency and results of such investigations in general.

The House bill had no comparable provision.

Discussion

The Conferees agree with the objectives of the Senate

provision although they believe that three adjustments to the provision reported by the Senate are desirable:

(1) The first adjustment is to add specific language to the provision making clear that the FBI's responsibility here is subject to the authority of the Attorney General. This would be implicit in any case, but the Conferees believed it desirable to specify this relationship in the statute itself for two reasons. First, it is contemplated that the Attorney General will establish guidelines and policies, in consultation with affected departments and agencies, to implement this section. Such guidelines would, among other things, take into account CIA's responsibility under Executive Order 12333 to coordinate counterintelligence activities abroad, the DCI's responsibility under that Order to coordinate foreign liaison relationships, and the DCI's responsibilities under the National Security Act of 1947 to protect intelligence sources and methods. Second, it is contemplated that should such departments or agencies have concerns with respect to the FBI's exercise of this authority in particular cases, their recourse would be to raise the matter with the Attorney General for resolution.

(2) The second change to the Senate formulation would be to clarify that that FBI's authority in these circumstances should be to supervise the conduct of espionage investigations, not necessarily to carry out all such investigations itself. Departments and agencies that have investigative capabilities and authorities insofar as their own personnel are concerned should not be precluded from using such capabilities and authorities when it is appropriate and desirable to do so. For example, each of the military departments has concurrent authority to conduct espionage investigations of its own servicemen under the Uniform Code of Military Justice (UCMJ), utilizing investigative techniques that are, in some cases, more readily available in overseas locations than those available to civil law enforcement authorities. By assigning the FBI a coordination role for such investigations, the Conferees do not intend to preclude use of investigators employed by other departments and agencies or the use of techniques authorized such investigators where it is appropriate and desirable to utilize them. Indeed, the Conferees anticipate that any espionage investigation conducted at a diplomatic establishment would ordinarily involve the participation of any investigative agency with concurrent jurisdiction over the subject and the use of all lawful investigative techniques that would facilitate the investigation.

While the Conferees intend that the FBI will supervise all such investigations, whether FBI agents will be dispatched to a particular diplomatic establishment where an investigation is occurring will depend upon the circumstances of the case, including the availability of FBI agents for

such purpose. The intent is that the FBI shall exercise overall supervision of those investigations that it does not conduct or participate in and that the FBI shall be informed contemporaneously of all significant developments in such investigations.

(3) The third adjustment to the Senate provision would be to clarify that departments and agencies should be legally required to report to the FBI any information concerning violations of the espionage statutes which they have identified. The language in the Senate bill would have required the reporting of any information "indicating" a violation of the espionage statutes. While the Conferees agree that the FBI should be brought into such situations at the earliest appropriate opportunity, they were concerned that the Senate formulation would be interpreted as requiring the reporting of all types of information concerning U.S. employees at diplomatic establishments to the FBI which might be construed as "indications" of espionage, whether or not such employee or employees had, in fact, been identified as a suspect in an espionage investigation.

The Conferees intend that, at a minimum, any department or agency which identifies a particular U.S. employee or employees at a U.S. diplomatic establishment as possibly having violated the espionage laws of the United States be reported at once to the FBI. Consultations at earlier stages with appropriate FBI Headquarters offices are encouraged, but the Conferees intend that the FBI take responsibility for the coordination of such investigations only after one or more espionage suspects have been identified. Thus, investigations of security violations or of suspected violations of regulations which might be eventually be linked to espionage, e.g. violation of fraternization rules, engaging in black market activities, etc., are left in the hands of existing investigative authorities until such investigations develop evidence of a link to a foreign government. Similarly, unsubstantiated, non-specific information coming to the attention of elements within a diplomatic establishment is not required to be reported to the FBI under this provision unless such information links a particular employee or employees to possible espionage. Again, seeking FBI Headquarters assessment of such information is encouraged, but the statute itself does not impose a reporting requirement in these circumstances. There may, for example, be legitimate concerns among departments and agencies who receive such information that premature dissemination of such information and subsequent investigative actions based thereon could unnecessarily expose sensitive confidential sources.

The Conferees also make clear that this provision applies only to the conduct of espionage investigations, not to the decision whether to prosecute, or whether to prosecute

in a civil or military court. These are decisions made by the Department of Justice in consultation with affected departments or agencies.

The Conferees further make clear that a decision by the FBI to terminate, or to decline to pursue, an espionage investigation under this provision, does not preclude departments or agencies with concurrent authority from continuing to investigate pursuant to such authority, or from continuing to investigate lesser or related offenses occasioned by the same conduct, for prosecution or appropriate administrative actions; provided that information concerning violations of the espionage statutes which may be subsequently developed shall be reported immediately to the FBI. Thus, in a case where the FBI decides to close an investigation of a military serviceman for espionage, the military investigative agency concerned may nonetheless continue its investigation or continue to develop additional evidence of lesser offenses--for example, failure of the serviceman concerned to report unauthorized contacts with foreign nationals--as the basis for courts martial or non-judicial punishment under the UCMJ. Should such investigations produce information concerning violation of the espionage statutes, however, such information must be reported immediately to the FBI.

It is also not intended that the responsibility assigned the FBI by this section to coordinate the conduct of investigations be construed as authority for the FBI to coordinate the conduct of damage assessments which would ordinarily ensue in these circumstances. This would be left to the department or agency whose classified information was the subject of the compromise in question.

Finally, this provision is intended solely to regulate interagency relationships, and shall not be construed to establish a defense to any matter based upon actions taken by the Department of Defense or any other department or agency with authority to investigate and dispose of allegations of espionage.